UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

RICHARD DASCHBACH, individually and on behalf of others similarly situation, Plaintiff. v. ROCKET MORTGAGE, LLC, a Michigan limited liability company, Defendant.	No. 1:22-cv-00346-JL March 2, 2023 10:05 a.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

APPEARANCES:

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P R O C E E D I N G S

THE CLERK: The Court has before it for consideration today a motion hearing in civil case number 22-cv-346-JL, Richard Daschbach versus Rocket Mortgage, LLC.

THE COURT: All right. So, left to right, Attorneys Ward and Smith and Tayman, Hennecken and, of course, Mr. Dutton in the back, right?

MR. DUTTON: Correct.

THE COURT: All right. Look, by the way, ground rules: Anybody can speak; it doesn't have to be just one person per side. Anybody who wants to chime in, I'm happy to listen. I have a few questions to start, if that's okay. I just want to sort of get some ground rules down about what the report is going to be and the rules of engagement here, and then I'll just let you argue away. I'm very happy to listen to your presentations.

First things first. It seems we have a disagreement about applicable law, California or New Hampshire, but it also seems like you seem to both recognize that there's really no significant difference in the applicable law. Is that true, or am I assuming too much?

MR. SMITH: For plaintiff, your Honor, yeah, I don't think there's any difference in terms of the Motion to Compel Arbitration regarding whether you apply New Hampshire law or California law.

MR. TAYMAN: We would agree with that as well, your Honor. One thing I would point out is I don't there's any evidence in the record that could support the application of New Hampshire law here.

THE COURT: Okay. So, is that your way of saying if I cite New Hampshire law it's going to be an error?

MR. TAYMAN: Well, your Honor, I think the evidence that Rocket Mortgage has put forth shows that there was a contract entered into in California.

THE COURT: Understood.

MR. TAYMAN: We know Mr. Daschbach's information ties to New Hampshire, but we don't know where he was at the time, because he put in no record evidence. So, in terms of applying New Hampshire law, I'm not sure there would be a factual basis to do that, but we do agree it seems to be that there's a consensus that, no matter California or New Hampshire, the outcome and the factor analysis are pretty much the same here.

THE COURT: Fair enough. All right. Let me see here. Are we all comfortable with the fact that we're going to go on the record we have and this oral argument? Is anybody here requesting an evidentiary hearing or anything like that at this point?

MR. SMITH: No, your Honor.

MR. TAYMAN: Not for Rocket Mortgage, no.

THE COURT: Okay. You know, we've got these documents

in the record, these screen shots. They are document numbers 15-11 and 15-12. I've examined those very closely. But there's also this video demonstration, there's the video itself, and there are representations of the screen shots in the video, right? What should I be relying on here, the screen shots, or the video, or both, or what?

MR. TAYMAN: I'm happy to take that, your Honor.

THE COURT: Sure.

MR. TAYMAN: And let me know if you want me to take the podium.

THE COURT: Oh, no, no. Wherever you're comfortable.

MR. TAYMAN: Sure. We think both, your Honor. The screen shots -- what I think is undisputed here is that the website was viewed on an iPad. I'm not sure the make, model, size, orientation, all that, so we wanted to make sure the Court has an accurate representation. This is what the screen shot -- this is what the web page looked like, and this is an experience of an iPad of how you go through that, because, of course, it might differ depending on the device the plaintiff used to visit it. So, I think what it shows is this is undisputed how it was constructed, how it looked, and this is the experience of going through it and how a user would have gone through the flow and what they would have seen as they go through. In the video, in particular, I think it points to the fact that you can't get to that Submit button without bringing

the disclosures into your view.

THE COURT: So, from your perspective, the video is fair game for the record?

MR. TAYMAN: Correct, your Honor.

THE COURT: All right. I'm sitting here on the bench with my iPad, and I use it to look at a lot of the evidence in this case. Honestly, it didn't occur to me much, probably should have, but it didn't occur to me much that what the experience is, this was an iPad situation, I guess, and, as I view the video on my iPad, is that roughly how it would appear on the Internet, as far as you're concerned?

MR. TAYMAN: That's my understanding --

THE COURT: Okay.

MR. TAYMAN: -- as it would relate to, you know, Mr. Daschbach. Again, all we know is the iPad, and some iPads are smaller than others, some are bigger, but this is meant to be a representation of how it would appear.

THE COURT: I've got a pretty large iPad here that the Court provided, but I remember once, when one of my kids was young, you know those machines, like, with the crane at an arcade where they pick up a toy? He got an iPad out of one of those machines, and this little iPad was in my house for years, you know. Sort of weird.

Anyway, I understand your position. Thank you. So, as far as you're concerned, the video is part of the record,

the screen shots are part of the record, and you want me to consider both.

MR. TAYMAN: Correct.

THE COURT: Your position?

MR. SMITH: Your Honor, I think you should focus on the video, the docket number 15-5. I think the video is the most accurate representation. Any time you take a screen shot and start putting it in documents you have to make it deal within the formatting. I think if you look at I think document number 15-11 I think the disclosure's actually more legible than it actually is in the video record, so I would urge the Court to base its decision on the video as opposed to any of the screen shots.

THE COURT: Okay. Okay. Those were my basic questions, actually, and you've answered them straight, which I appreciate, without a lot of qualification or dancing around.

All right. It's your motion. I'll let you go first.

MR. TAYMAN: Thank you, your Honor. Kyle Tayman for Rocket Mortgage. I will be arguing the Motion to Compel Arbitration.

Your Honor, we submit that on the briefing it's clear there's an undisputed fact that there was an agreement to arbitrate here. There was inquiry notice and assent, and that's sufficient for the Court to compel arbitration and to dismiss this case. To the extent the Court would like to hear

on the Motion to Dismiss that we also filed, my colleague, Ms. Hennecken, will present argument on that.

THE COURT: Okay.

MR. TAYMAN: I'm going to request a few minutes just for rebuttal, your Honor. I'm going to focus my argument on the issues of the inquiry notice and the assent. The rest seems to be undisputed as to my client's, Rocket Mortgage's, standing to enforce this arbitration agreement as well as the fact that the claims here fall within the scope of the arbitration. We present those in our briefing, and, again, they were undisputed.

THE COURT: If it helps you frame your argument, just for what it's worth, right, enforceability is going to come down to two elements, right? It's got reasonably conspicuous notice and manifestation of assent. I think Rocket Mortgage is stronger, frankly -- I haven't prejudged it, but I think Rocket Mortgage is stronger on manifestation of assent. It's not a done deal for me, and I'll have an open mind about it, but I'm more focused, to be honest, on the reasonably conspicuous notice aspect. It doesn't mean you shouldn't address both. I just want you to know where my head is.

MR. TAYMAN: That's helpful to hear. I appreciate that, your Honor. I'm glad to tailor and focus the argument in that regard and answer any questions along the way.

THE COURT: Okay.

MR. TAYMAN: So, your Honor, we submit that there's no material dispute that the plaintiff twice agreed to arbitrate his claims here through two separate visits to the website in question. That's the enhancedrefinance. -- the refinance.enhancedrefinow.com website. I'm going to refer to it just as the "refinow" website, for shorthand. And that his agreement to the arbitration twice, again, requires the Court compel arbitration and dismiss this case.

This is the same outcome that the Eastern District of Michigan, Chief Judge Cox ordered in the Shirley versus Rocket Mortgage case last year on a very similar factual record, substantially the same screen shots. It's a very almost identical website, and also he relied upon a very similar video experience to show the experience of a user going through the website.

Factually, your Honor, just a little background. So, LowerMyBills is a sister company to Rocket Mortgage. Rocket Mortgage is an affiliated company. We established that in the declaration from Mitchell Viner. LowerMyBills offers free online websites that allow consumers in the market for a mortgage to identify providers that can meet their needs, so it's a free matching website. Consumers can go get in the car, drive down the street, go to a bank, they can get online, go to different bank websites, call different banks, or they can use services like LowerMyBills offers through the refinow website,

where you go on, put your information in and get matched to consumers.

THE COURT: I need you to slow down a little bit for the reporter.

MR. TAYMAN: Sure.

THE COURT: Just moderate a little bit, please.

MR. TAYMAN: Sure. And consumers can be matched to lenders who can meet their needs. There's no cost to this, and the only requirement is the consumer agree to the Terms of Use for the website, which includes the agreement to arbitration. It's more than a fair bargain.

Again, I think it's undisputed here that Mr. Daschbach twice went to that website, first on September 13th, 2021 and then again on December 20th, 2021 --

THE COURT: Yeah.

MR. TAYMAN: -- established in the Viner declaration. Each time he went in he put his first name, last name, his telephone number, his email address, the property address that traces to public records that it's his, and, again, that he used an iPad through a Safari browser to go there. In opposition, there was no declaration, no evidence submitted to rebut any of that.

Your Honor, I think you framed it correctly that there's two real issues here in terms of the inquiry notice and manifestation of assent that courts focus on, that California

courts focus on when reviewing the enforceability of an online agreement. There's a few things as to the inquiry notice that the Courts -- a few factors they look at. They're not exclusive, but generally as you look through the cases that we've cited, the Ninth Circuit case in Nguyen, Lee versus Ticketmaster, Dohrmann versus Intuit, the things they look at are, one, is there explicit notice to the user of what action they're going to take to bind them to the agreement? That's usually explicit disclosure right near the, it's called the action button or the submission button.

Second, they look at the terms of use, where it's a hyperlink, and whether that was conspicuously disclosed. The factors they look at there are is the font color offset from the surrounding text, usually in blue, is it underlined, capitalized, and clear to the user that there was a hyperlink there that, if they want to, they can click and read the terms.

Third, they look to see whether the terms of use is proximally located to the explicit notice and the submission button.

And, last, the Courts may look at whether there's any distractions, any distracting advertisements, videos, larger pictures distracting or other font that takes the user's focus away from the terms in the notice.

Your Honor, with your permission, we would like to pull up 15-11, Exhibit 1 to the Viner declaration, to go

through it.

THE COURT: Okay.

MR. TAYMAN: So, your Honor, this is the website that --

THE COURT: Give me one second. I want to get my screen up.

MR. TAYMAN: Sure.

THE COURT: Okay. We're good to go. Thanks.

MR. TAYMAN: So, this is the website that Mr. Daschbach visited in his first visit, September. We'll see it slightly changes between this one and his December visit in immaterial respects. We would submit that this is the accurate representation of how the website appeared. Again, the video submission, which I'm glad to get to in a minute, is to show the experience of someone going through an iPad. The video submission, it is more challenging to make that an accurate representation, and, as you're creating a video of the video of the user experience, there is some degradation. So, we would submit that shows the experience; the screen shots show what it looked like in terms of analyzing the notice and issues before the Court.

THE COURT: Why?

MR. TAYMAN: Pardon me?

THE COURT: Why? You said the video shows the experience.

MR. TAYMAN: Correct.

THE COURT: The screen shots show what it looked like.

MR. TAYMAN: Correct.

THE COURT: I'm trying to understand what that means. The experience is what it looked like, right?

MR. TAYMAN: In terms of capturing what the experience is on an iPad, creating it into a movie video to submit as an exhibit for the Court there is some degradation in quality.

THE COURT: Okay.

MR. TAYMAN: And I can tell you it's not very easy to do this accurately. We had to try a few times, because it's very clear if you don't do it right it doesn't look anything like the experience. So, again, the video is supposed to show the flow and how someone interacts with it with a finger going through an iPad. We think the screen shots here accurately reflect how it was designed and presented.

THE COURT: But this video still exists, right? This is still on the Internet?

MR. TAYMAN: The website is.

THE COURT: Yeah. It still has the video, as far as I know, doesn't it?

MR. TAYMAN: The video --

THE COURT: I went on the website and watched the video.

MR. TAYMAN: We submitted a video exhibit.

THE COURT: I know.

MR. TAYMAN: There is not a video on the website.

THE COURT: Okay. I might double check that, because I thought it actually did.

MR. TAYMAN: If it is, that's not how it appeared when the plaintiff went to it.

THE COURT: Understood.

MR. TAYMAN: I know the website is active today. We have not put any record evidence that what it looks like today is what it looked like in 2021, when the plaintiff went there.

THE COURT: Okay.

MR. TAYMAN: I do believe there would be some differences. I don't know if they're material or not, but, again, that's not in the record today.

THE COURT: Thank you.

MR. TAYMAN: So, this is the page, the submission page, after he's gone through the flow. If we could go to the -- this is question 14 of 15. If we go to the last page, so this is the submission, the final flow submission page. You can see he's instructed to put his first name in here, his last name, and, as you go through the flow -- you can scroll up -- he puts in his phone number, he has the option to put in a secondary phone number, and then there's the large See my results! button in green. Below there are the disclosures in dark green font. It's a contrasting color to the background,

so it's visible. He's put on explicit notice that, quote, By clicking the button above, you express your understanding and consent, electronically via E-sign to the following. So, that's the explicit notice that the courts looked for in some other cases, such as Berman was lacking where the Court did not compel arbitration.

Next, the terms of use. It is in contrasting color. It's in blue font. You can see it enumerated in number 2 in this list. It is underlined, indicating that it's a hyperlink. It's also capitalized, indicating that you're going to be taken to a separate document, documentation. Again, these are all the things the Ninth Circuit and California courts look for the hallmarks of indicating that there is a hyperlink there.

In addition, your Honor, the terms of use are proximally located to the See my results! button and the explicit notice that, by clicking the button, the person is agreeing to those Terms of Use.

Finally, there are no distracting ads, videos or sound, no distracting imagery or other font off to the side to distract the user away from this.

So, we think this has all the hallmarks of inquiry notice, just as the Court found in the Shirley case last year.

If we could -- just quickly, your Honor, I'll put up the next one for the December visit.

THE COURT: Shirley is gray text over white

background, right?

MR. TAYMAN: That's correct, your Honor.

THE COURT: This is more like gray on gray.

MR. TAYMAN: That's correct, your Honor. And when that comes up in the cases the courts aren't saying that the same color font on the same background is disqualifying. What they're saying is the contrast is not sufficient enough to allow the user to read it. Here, the contrast between the gray and the gray background, we do think it's sufficient enough that it's clearly legible to the naked eye that it puts a user on notice, and they can read it. It is not in some other cases gray on gray or a black on a dark gray such that you can't actually see the font and you can't read it.

So, this is the -- can we go to the next page?

This is the December 1, your Honor, and you can see the construct is pretty much the same: first name, last name. If you scroll down, there's slight differences here. It allows the user to select preferred method of communication. There's some slight differences in the disclosure language. In the interim my client had changed its name from Quicken Loans to Rocket Mortgage, so Rocket Mortgage is clearly disclosed in paragraph 1 there, whereas before it was identified as Quicken Loans.

Your Honor, with your permission, I'd like now to turn to the video.

THE COURT: Please.

MR. TAYMAN: So, this is, again, this is the experience of a user on an iPad. This is the landing page for the website. This is the first page where the user is informed that, by going through this flow, they can be connected to a lender about their refinance options. I'm just going to go ahead to the last page, your Honor, because that's the page at issue.

THE COURT: Yeah.

MR. TAYMAN: If you want to back up a little bit to 1:56, and we'll play it from there.

So, again, this is how it looks when the user comes to this last page. As the user presses with their finger on the fields, it's the common experience we've all had using these types of devices -- we just lost it. And now we're back.

THE COURT: Now we're back.

MR. TAYMAN: Okay. So, as I was saying, as you click on the fields to enter your information, it's the common experience with the mobile device where the digital keyboard comes up. It obviously blocks some of the screen, but, as you can see, as you press through the fields, the screen moves up, and, again, in order to get the See my results! button you have to, one, put the information in. As you put the information in the screen will scroll up. And, two, to be able to get down there, you have to scroll up. So, by the time you get down,

you select your preference communication, the See my results! button is fully in the user's field. The disclosures there below are visible. Again, we would submit that the quality is as reflected in the submitted document exhibits to the Viner declaration. There's slight degradation when we copy it over to the video, but, again, we think all the hallmarks of notice are here, the language required for assent is here, and so it meets the qualifications under the law for an enforceable online agreement.

Your Honor, I'd like to show just three other examples from cases we submitted, and we submitted these exhibits to the Court last week, that we think, again, support that there was agreement to arbitrate here and the Court should compel arbitration.

THE COURT: Okay.

MR. TAYMAN: First is from the Shirley case. This is Exhibit 5 in the binder that we submitted.

So, this was -- as you noted, your Honor, you obviously are familiar with this. This is what the Court in Michigan enforced last summer. It is another lowermybills.com website. You can see the disclosures are set up very similarly in terms of the spacing below the button, the express disclosure, the enumerated provisions the consumer is agreeing to, the Terms of Use being in blue font, underlined, offset, and, again, we have no distracting ads or videos. And this was

enforced again by the Court last year. The evidence was put in by the same Mr. Viner here, LowerMyBills --

THE COURT: Slow down.

MR. TAYMAN: -- with the declaration before you. My apologies.

THE COURT: It's okay. We all do it.

MR. TAYMAN: Next I'd like to turn to Exhibit 7 in the binder we submitted. This is from the Hill versus ActiveProspect case. It's in the Central District of California from 2021.

This is not a LowerMyBills website, but it is a partner of LowerMyBills, so it has LowerMyBills' disclosures, it has the LowerMyBills Terms of Use, it is the same arbitration agreement, and you can see the setup is much the same. The See my results! button is almost identical, instead it's blue here.

In that case the user went through the flow once, unlike Mr. Daschbach here, who went through it twice. There was a challenge to the sufficiency of the contracting. Again, there was a declaration from Mr. Viner to support the evidence before the Court, and, upon reviewing the evidence, the Court held that it was an enforceable clickwrap agreement. We think that's defensible. I think there's no dispute here it's at least a hybridwrap agreement of the type that courts routinely enforce, and the court in the ActiveProspect case held that it

was indistinguishable from other Internet contracts routinely enforced.

The last one I'd like to show you, your Honor, is from the Rodriguez versus Experian case. This is Exhibit 5 in our binder. This is a Central District of California 2015 case. This is also a LowerMyBills website. LowerMyBills was the defendant in this case, and they moved to enforce arbitration, and the court enforced it, holding, quote, This is exactly the type of notice the Ninth Circuit in Nguyen required and approved of. As you can see, the disclosures here, again, there's offsetting blue coloration of the Terms of Use, there's an express notice to the consumer of the action by taking -- what would happen by clicking the button. Those disclosures are actually further down from the button than here. But, again, this shows a consistent experience with these websites, all of which are by LowerMyBills or have the LowerMyBills terms, where the Courts in California and outside of California applying California law have consistently found they're enforceable and held -- and compelled arbitration.

Last, your Honor, I just want to touch upon the cases, some of the case law that the plaintiffs cite in their oppositions, because we think, as we showed in the briefing, it's distinguishable from the website here.

First, they cite to Berman versus Freedom Financial in the Ninth Circuit. There's a couple of distinguishing factors

that are starkly different from the website here. The hyperlinks there were not in contrasting font, they were not underlined, they were not in capitalization to offset them from the surrounding text. The Court also found that there was no explicit assent language informing the consumer of what action they would take to agree to the terms, and there was distracting design elements. There were advertisements all over the page, directing the user's attention away from a clear, you know, vertical reading pane and looking at other parts of the page.

Second, the opposition cites Cullinane versus Uber, a First Circuit case. There on the hyperlinks alone the court found those to lack conspicuous disclosure. The hyperlinks, again, were not in blue, not underlined. Instead of being hyperlinks at all, they were, instead, in a gray, clickable box, which, again, is far different from the type of disclosure we have here in this website and the type that courts routinely enforce.

Third, the plaintiff cites Nicosia versus Amazon, a Second Circuit case. There the terms of use were not adjacent to the Place order, the Submit button. It was, in fact, far away, on the opposite side of the page. The court also found that there was no assent language near the button. For those reasons there was insufficient formation of a contract, and the court did not enforce arbitration. Again, none of those

factors are present here.

Last, two days ago the plaintiff submitted a supplemental authority from the Williams v. DDR case, a District Court case from California. Again, the facts there were far different from what's here. There was zero evidence in the record that the plaintiff even assented, even agreed to the terms. The assent language referenced a get-started button that was not even existent on the web page, so there was no ability for a manifestation of assent.

And then, as to inquiry notice, the court again found defective the hyperlinks. They were not in a contrasting blue font to contrast them from the -- and they found that there was distracting design elements and imagery below and next to the disclosure, like in Berman.

And then they commented on the disclosure language, that it was a very long, dense paragraph, very different from what we have here, which is enumerated, easy for a user to follow through and read and discern the different pieces.

So, in closing, your Honor, again, we think on the record evidence before the Court it's undisputed that Mr. Daschbach went to these websites twice, he twice went through the flow, twice agreed to the terms, he clearly manifested his assent, there was clear, explicit notice to him of what he was agreeing to by taking the action, and that the disclosures meet what the law requires, and therefore the Court

should compel arbitration.

Again, I'm happy to have a few minutes in rebuttal.

THE COURT: First of all, nobody has to worry about rebuttal or whatever; you're all going to get to say everything you want to say today.

MR. TAYMAN: Thank you.

THE COURT: I have a couple of questions for you, but I want to hear the other presentation first, and I'll circle back.

MR. TAYMAN: Thank you.

THE COURT: I guess what I'm kind of -- maybe this is what counsel will talk about a little bit, but I understand your point that you think there's been some degradation in the video from I guess what we would call the online experience, right? It's not something I can really -- it's something I can understand and appreciate, but it's difficult for the Court to then extrapolate how it would have looked online in a way I can rely on for a ruling.

And here's why I ask, or here's what I'm wondering about, and I'm going to listen to counsel, but just does the summary judgment standard, where I'm supposed to draw some inferences in favor of the nonmoving party, matter in that comparison between screen shots and video or assumptions about video and degradation from online? I'll be asking you about that when we come back.

MR. TAYMAN: Glad to answer it.

THE COURT: Okay. Go ahead.

MR. SMITH: Thank you, your Honor. So, I want to first start by addressing the video evidence, and then I'll jump into the arguments regarding conspicuous notice as well as unambiguous assent. I think you can fairly analyze the video when coming to your decision on this ruling. I mean, Mr. Viner submitted that as Exhibit 3 to his declaration.

THE COURT: Oh, he's agreed that it's part of the record.

MR. SMITH: Yeah. It's a true and accurate copy, and if you go to the actual website I would say the video is a lot more accurate than the screen shots. Any time you put a screen shot in a document -- I mean, they took issue with my screen shots --

THE COURT: You've got to slow down.

MR. SMITH: Sorry.

THE COURT: Try to speak up and slow down. But let me ask you a question.

MR. SMITH: Yeah.

THE COURT: I asked him about that, because I thought -- I went to the website, and I definitely watched a video, but it wasn't this video. That's for sure. I just wanted to take a look. And I know it's not part of the record. I'm just disclosing it. I'm not going to rely on it. But it sounds

like you're saying I can watch the video right now online. No?

MR. SMITH: You can go to the website, but it's not a video. It's a process you go through, right?

THE COURT: But there used to be a video on the website at the time your client went through it, right? That's your position?

MR. TAYMAN: No, your Honor.

THE COURT: No?

MR. TAYMAN: May I?

THE COURT: Yeah.

MR. TAYMAN: Again, there was no video on the website. It is a web flow, where you go through 15 different screens --

THE COURT: That part I get.

MR. TAYMAN: You have to click to get through, but there was no video on the website.

THE COURT: There wasn't like some click-the-arrow video to watch?

MR. TAYMAN: No. I don't think that's in dispute.

THE COURT: Thank you. That's my own confusion. You just clarified it. Thanks. Okay.

MR. SMITH: So, I just want to make a point that I think the video is fair evidence, and the Court should rely on it.

Now, when it comes to online contract formation in the inquiry notice context, courts are in agreement that it

requires conspicuous notice and unambiguous assent, and when it comes to conspicuous notice, it seems like the defendant in this case wants to kind of sidestep Berman and Cullinane and focus on these District Court cases, such as the Shirley case, but, as we point out in our brief, the Shirley case is distinguishable from the disclosure in this case. For one, it doesn't include one disclosure, it includes multiple disclosures, and that played into the court's analysis as they were determining whether or not the notice was sufficiently conspicuous. And then it also contained contrasting font color; I think it was a white background with gray text. If you compare it to the instant disclosure, I think it's far more readable than the disclosure in this case.

But I think there's also a fundamental issue with the decision in Shirley, and I think that Shirley improperly analyzed the Berman case, which is the standard that courts are required to follow. I think -- I think the -- well, the judge in the Shirley case said, look, yes, the font was smaller, but consumers didn't have to parse through loud videos, they didn't have to parse through screen links to fine print. But, if you look at the disclosures in Berman they also didn't have to parse through any loud videos, there was no fine print, the disclosures were actually I think one sentence in each case, and they were located above the button that the defendant claimed was used to manifest assent. I simply think Shirley

was wrongly decided.

But if the Court is looking for a case that's more analogous, we filed a supplemental authority a couple of days ago regarding the Williams versus DDR Media case. In that case the Court analyzed a similar website that involved gray font on a gray background, and in that case, just like in this case, the defendant was arguing that it was comparable to a website that contained a white background with a contrasting font color which I think was also gray. The judge rejected that argument, saying that the gray on gray makes it too difficult to read, and then the judge also pointed out that, when you bury these terms in fine print, it makes it all the more likely that consumers aren't going to notice it or see it. The same is true here. You have four paragraphs of fine print that you have to read through that you're supposedly being bound to.

But what I would ask is that the Court look to the standards laid out in Berman and Cullinane and conduct its own analysis, because really it's not a technicality test; it's a substantive test. You should look to the form and the content of the web page.

I guess the question, distilled in its most basic form, is, when you look at the website are the terms presented in a way that would draw a user's attention to them, or are they presented in a way that would draw a user's attention to something else? And when you look at the disclosure at issue

here, it is the opposite of conspicuous. If you just take the disclosure itself, which, again, for the purpose of this motion Rocket Mortgage really wants to focus on the actual disclosure, but it has to be read within the context of the overall web page. It's well below the See my results! button and out of sight for the typical users. Each page prior to that has substantially larger font, and the page on which you submit your information uses substantially larger font and an outsized button to draw users' attention up above, to where the actual terms are located, and then you actually get to the terms, and they are printed in tiny gray font on a gray background. They're barely legible to the naked eye, and they're smaller than not just all the text on that page, all the text on that website. That's really problematic. That's not a mistake, your Honor. If you watch how you go through the process --

THE COURT: What do you mean it's not a mistake? You're asking me to draw an inference of intentional -- of an effort to conceal information. How does that fit in?

MR. SMITH: Sure.

THE COURT: Is it just an objective observation, or is it really -- am I supposed to be, like, ascertaining and inferring, you know, ill intent?

MR. SMITH: No, I don't think you have to infer intent. I'm just pointing out, like, if you look at the process, they ask for users' credit information, they ask for

users' address, they ask for I think whether or not they have a VA loan, and all this they do is sliding scales, large buttons, colorful emoticons and substantially larger font, but what this demonstrates is that the website developer understands exactly what they need to do to bind a consumer, but when it comes time to disclose the disclosure and they seek to bind with the arbitration agreement at issue all of a sudden that font size is reduced to the smallest font on the entire website. I don't think there's an intent, but I think it calls into question whether or not it was designed in a way to draw a user's attention to it, or whether or not it was designed in a way to draw a user's attention away from it, and that's really the relevant inquiry.

And then there is the submission process itself. Once again, Rocket Mortgage wants to focus on the last page, but I think it needs to be read in conjunction with all prior 15 pages. This was a process. Rocket Mortgage -- or LMB asked consumers for information and promised them that they would get rates and helpful information regarding their loans. For 15 pages users submitted information, and they were conditioned to click the Next button to continue moving on in the process.

But even if you focus on the last page, your Honor, it's arguably the worst page. It's riddled with misinformation. Right at the top it says, Great news! Your results are ready to view. But that's a misstatement. There

will never be any results on that website. And then it says, Complete this final step to see your potential savings! But, once you complete that final step, there are no results or savings for you to review. It also asks you to click a button called See my results!, but, again, you click that button there are no results; there are just links to third-party websites.

I think this has to be taken into consideration, because, when you're looking at whether or not you're trying to draw a user's attention to make it noticeable to the terms or the process, I think it's incredibly misleading to mislead individuals into thinking, Look, you're going to get helpful information about the loans, just complete this process, you're almost done. It's not putting people on notice that, hey, this process is actually to acquire your information to be sold to third parties and there's all these litany of details regarding what you're bound to, and a lot of them don't even relate to telemarketing. I mean -- well, sorry, don't relate to telemarketing for mortgage purposes. They can sell your information to solar companies.

THE COURT: Oh, yeah, I'm aware of all of that. Yeah.

MR. SMITH: They can check your credit using this.

So, I think the issue here is that you have to read the website in the context of the overall design, and, when you do that, you see that this disclosure is not conspicuous.

As the court in Berman pointed out, website users are

entitled to presume that important provisions that the website developer seeks to bind them to must be conspicuously displayed, not buried in fine print. This disclosure is the definition of burying terms of an arbitration agreement in fine print.

I do want to turn to, briefly, unambiguous assent and just address that with a few points. I think you indicated you're leaning towards finding that that is unambiguous assent, but I would like to point out two things. Number one is the placement of the disclosure compared to the placement of the See my results! button. On its own See my results! does not suggest to any reasonable user that you would be manifesting assent to any agreement. So, if you look at the other cases, a case cited by the defendant, I think it was in the Second Circuit in their reply brief, the button said Accept, right? In a lot of these cases where you see Accept, Place order, Create account, that triggers to a reasonable user that you're agreeing to something, you're agreeing to take a step, right? But when you see See my results! you're not expecting that's the final step.

THE COURT: That's true. I agree with you on that.

MR. SMITH: Yeah. You're accepting to move on.

THE COURT: The button analyzed as a button.

MR. SMITH: Right. And then there is the issue of the fact that it's out of sight. If it's not conspicuous and you

don't even see the By clicking this button, how can you say that they understand that that has manifesting assent?

And then there is the issue of vagueness. There are two buttons. It's See my results! or Back. The defendant counters the Back isn't a button. I think they say it's a clickable text.

THE COURT: Slow down.

MR. SMITH: Sorry. That sounds like a button to me. The reality is that it's not clear, and the onus shouldn't fall on the website user to determine which action they must take. This can be solved simply, your Honor. By clicking the Get my results button you agree to the terms, and it should be displayed in a font size and right next to the See my results! button so individuals understand that they're taking an affirmative step to bind themself to something that is legally significant. That's not present in this case.

So, unless you have any other questions, I would ask that the Court deny the Motion to Compel Arbitration.

THE COURT: Thanks.

Go ahead, sir.

MR. TAYMAN: Sure, your Honor. Let me start with the point you raised when I sat down regarding the video.

THE COURT: Yeah.

MR. TAYMAN: I think it's very clear that, if you are relying on the video alone, it meets the summary judgment

standard, and it's consistent with the case law that we put before you. That includes the Berman case. We're not running away from it. We put the exhibit in front of you. We are happy to pull it up to show the drastic differences between what's insufficient in Berman and that they're not here. So, we think there is no issue between the screen shots and the video. We do think the screen shots more accurately capture what the page looked like, but we are not hiding or running away from the video. We think it's sufficient on the summary judgment standard that you can grant our motion and compel arbitration.

I'd also note that the video that was submitted by Mr. Viner from the time of his declaration of the experience, again, going through the iPad, that at that time plaintiff put forth no evidence of a different experience or a different view of their own. To the extent they're speaking about their own experience about the website today, again, as your Honor noted, that's not in the fact record before the Court.

Going to the other points that my colleague raised, with respect to Shirley, yes, the user there, there were two different places where the user assented to the terms. That was not dispositive to the court's ruling. If you read the decision, the court notes it but doesn't note that, oh, because of the two visits therefore I'm going to find there was agreement to arbitrate, whereas I wouldn't have if there was

one.

Moreover, it's no different than the facts here. In fact, Mr. Daschbach had more of an opportunity here because he twice went back to the website, twice went through those 15-page photos, so he had two opportunities to understand what he was doing.

THE COURT: Yeah.

MR. TAYMAN: My colleague also said that Shirley incorrectly analyzed Berman with respect to the videos. Again, we explain this in our reply brief. That's a misreading of the Shirley decision. As I'm sure the Court can see for itself, the judge in Shirley was addressing two cases by the opposition, one of which was Shultz, the other one's name is escaping me at the moment, where there were videos present, there was distracting ads, and that's the part of the opinion the court is very clear he was addressing those aspects, was not suggesting that there were videos in Berman.

With respect to the Williams-DDR case, I think I already addressed that. I think if you look at the screen shot there it's, again, drastically different than what we have here. It didn't have the hyperlinks, it didn't have the blue hyperlinks, and there was distracting design elements, and the terms of use were buried in the middle of long (ph) font, again, not offset and enumerated, like we have here.

My colleague also mentioned that the website here

draws the user's attention to somewhere else. I'm not sure what he was referring to, because on this flow it's a very vertical flow, where you just read straight down, again, unlike what you see in Berman and these other cases. There is nothing off to the side, no pictures or images that say, as was the issue in Berman, Sign up for a free gift here. It's very clear what the user is doing and what they're going through.

With respect to the font size, there is no court case that we are aware of and is not in the record before the Court that says, just because the disclosures are smaller than surrounding font, that's disqualifying. Berman notes that, you know, to the extent the font size is equal size, that's supportive of assent, but consistent with the Nguyen case and the Intuit case and the Lee versus Ticketmaster case, there is a long precedent under Ninth Circuit law and California law that smaller font size is acceptable for terms of an online enforceable agreement that the disclosures were smaller than the other surrounding text. The issue is, is it sufficiently noticed -- sufficiently conspicuous to the user, and we would submit that it is here, consistent with the examples we've put before the Court.

As to the prior flow pages, the prior 15 pages, again, they raise this issue, we addressed it in reply, there's no history in the cases where you look at the other pages to determine whether or not there was a contract, enforceable

contract, on the last submission page.

THE COURT: But just as a matter of contract law do you really think there's any problem with evaluating the conspicuousness in light of the whole experience as opposed to one screen? What's the problem with that?

MR. TAYMAN: Well, your Honor, I would just submit that that's not how courts treat this when they're looking about whether or not there was an enforceable agreement, because they're looking at the moment of --

THE COURT: Is there authority that says they can't treat it that way? I understand what your point is. You haven't seen it done, but that's different than you can't.

MR. TAYMAN: I'm not aware of authority that you can't, but I think there is a reason why you don't see cases where courts are looking at it, because what you're agreeing to on that page, nothing on that page informed Mr. Daschbach that, Hey, you're agreeing to terms five pages ago or six pages ago. That's not what the contract was. The contract was that page in front of him that, Hey, you're going to get your free results, what he was told on page 1, which was connected to a lender, a lender who can meet his options, and here are the terms to get your free results. Give us your contact information.

In terms of getting calls, it's right there on number 1 that he is explicitly consenting to be contacted. That's a

long paragraph, because, unfortunately, there's just been a proliferation of these types of TCPA cases, and under the law in many states, TCPA laws from many different states, you now have to put this language in. So, they would love not to have that long paragraph there, but this is required as a matter of law. So, it's very clear that he's agreeing to these things. And, again, he was told, as we saw on the video, told on page 1, You're going to be connected to lenders.

Now, as to the results, again, I don't think that's in the fact record. Nothing -- we've gone into that. I know it shows up in the video, but what he's being told, and we can pull it up again, if your Honor would like to see it, is these are the lenders that you're being connected to, so he knows who is going to be contacting him per his agreement, and enumerated at paragraph 1 there under the disclosures that he's consenting to receive calls, and, again, my client is explicitly called out in the blue font and underlined.

Your Honor, you also mentioned and you commented on that users may also agree to other types of calls, like solar. If you look -- if you read the disclosures -- I'm looking at the -- actually, if you don't mind, I'll just pull it back up so we can all look at it together.

THE COURT: Yeah.

MR. TAYMAN: So, this is the second screen shot from the December visit. What it says in number 4, it says, If you

selected above, you consent to be matched up to three additional providers about solar, home improvement, et cetera. So, that's not a, You are getting contacted. It is in these flows the user may have the option to select that, and, if you do select that, then you will hear from those providers. It is not that you're going to get bombarded with calls from solar services because you wanted to find out about a mortgage. You only get those calls if you opt in, and, as it says, it's only from three providers.

Finally, your Honor, with respect to the nomenclature of the button itself, again, we've showed numerous examples where these buttons with different terms have been enforced. There is no holding that it must be Accept or I agree. There is no requirements. What is required is that the user is given explicit notice of the action they must take to agree, and here they're told that, clicking the button above.

I would note the case cited by my colleagues, the Bel Air case from New Hampshire Supreme Court, what they say the issue here is not whether the document is a paradigm of draftsmanship. We are not here to determine whether this is the best contract in the history of contracts. We're looking at whether under California law this is a sufficient online enforceable contract, and we think we've demonstrated numerous examples where this is entirely consistent with binding law from California that meets all the hallmarks and is

enforceable.

Your Honor, if you have any more questions, I'm glad to take them; otherwise, again, we would ask the Court to compel arbitration.

THE COURT: I understand. You want the last word on arbitration?

MR. SMITH: I just want to make one last point, your Honor.

THE COURT: Sure.

MR. SMITH: There's just one issue that I forgot to address in my initial argument.

There are attempts to distinguish the Williams case. I think it is inaccurate. They're saying it dealt with assent. It did deal with assent, but it also dealt with conspicuous notice. The courts found it violated both prongs of the Berman standard. So, I just want to point out that, even if the Court finds that there is assent in this case, Williams is still applicable for the purposes of analyzing whether or not the disclosure is conspicuous.

Unless you have any questions, I have nothing further.

THE COURT: No. Okay. We can move on to dismissal.

Go ahead, Counsel. I know you want to be heard on this. I'll tell you what I'm struggling with on this is this idea that I'm supposed to rely on the original complaint and the facts in the original complaint. The law supports that?

MS. HENNECKEN: Yes, your Honor. This is Christina Hennecken for Rocket Mortgage, and I can start with your question.

THE COURT: Yeah.

MS. HENNECKEN: And I think we cited a couple of different cases in our briefing where courts have consistently looked at original pleadings if there were facts pled and they can be considered as admissions.

THE COURT: Sure.

MS. HENNECKEN: And one of the -- I can point to a couple of them. One of the cases we cited was Phillips versus Murphy. It's a District of Massachusetts case, where the court had a due process claim in front of it and was considering a motion to dismiss an amended complaint and looked back at the original complaint to assess whether a certain fact had been pled and considered that in dismissing the due process claim.

Another case we cited was, I believe, Lifchits versus National Insurance (ph), another District of Massachusetts case, showing that this was appropriate.

In our case the plaintiff here has -- he admitted he was online looking for information about a mortgage and that he went through a process and submitted the phone number, and, as alleged in the original complaint, he said he made a submission of his personal information and shortly thereafter received calls from Rocket Mortgage about a mortgage. So, the plausible

conclusion there is that Rocket Mortgage called him as a result of his online activity.

I'm happy to answer additional questions or just start from Counts One and Two and proceed from there.

THE COURT: You proceed however you're comfortable, but, look, I've been through it in trial situations and summary judgment situations where people disagree about whether I can use complaints as admissions. I've seen people confront witnesses with them in court and other lawyers object. I agree with your proposition that that complaint, the original complaint, certainly is full of admissions of party opponent, right?

MS. HENNECKEN: Mm-hmm.

THE COURT: But there seems to be case law applicable to this particular situation that says we shouldn't focus on that, as a matter of fact, maybe even that we can't, and I guess that's what I'm struggling with, right? Like, I can use it in summary judgment, but I don't think I can use those admissions under Rule 12(b), because I'm supposed to use the operative complaint.

Do you follow what I'm saying?

MS. HENNECKEN: Yes, your Honor, and the two cases I just cited were considered on 12(b)(6) motions, and there's additional authority we cited.

THE COURT: Did you say it was Murphy? Is that what

you said?

MS. HENNECKEN: Yes, your Honor, and Lifchits was the second case.

THE COURT: Okay.

MS. HENNECKEN: And there's actually a third case we cited called Jeranian versus Dermenjian. I'm not sure I'm pronouncing that incorrectly. It was a District of Rhode Island case, and in that case the court actually considered facts and admissions in different filings from the parties, because he was considering a motion to dismiss a counterclaim, and there had been lots of briefing by the parties on other issues, and he considered those previous filings in dismissing that counterclaim as admissions of fact. In that case the Court also considered statements the parties had made in filings in a separate case because they're in the public record and considered those to be admissions that he could take notice of.

THE COURT: Okay.

MS. HENNECKEN: So, I'd like to -- well, first of all, Rocket Mortgage's position is the Court should dismiss the amended complaint and dismiss all six counts for failure to state a claim, and I will start with Counts One and Two, because I think the law is well settled that both those counts should fail for failure to state an essential element of those claims.

So, in Counts One and Two plaintiff has alleged that Rocket Mortgage violated the Telephone Consumer Protections Act auto dialer provision or an automatic telephone dialing system, or ATDS, and to state a claim under that provision you have to allege that the defendant placed calls using that technology without your consent, and the problem here is he hasn't pled facts plausibly showing that that technology was used, so he hasn't met an essential element, and that's, in my opinion, and I think the courts' opinion or general consensus is that it's well-settled law. So, in the statute itself the term "ATDS" is defined, and it's defined to mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator.

And there was a Circuit split on this issue, and, as your Honor knows, the Supreme Court spoke to this in the Facebook decision and stated that an ATDS must, in fact, have the capacity to either store the telephone number using a random or sequential generator or producing a telephone number using a random or sequential generator.

THE COURT: You've got to slow down when you're reading. We all read faster than we speak. We've got to be careful here so we can have a record.

MS. HENNECKEN: Okay. Yes, your Honor. So, on the facts pled here all plaintiff has alleged is the conclusion that Rocket Mortgage used an ATDS, and, in fact, the facts that

are pled are totally inconsistent with the use of random or sequential number generators, because plaintiff pleads that he received targeted phone calls. We know that he alleges four phone calls in September 2021, one text in September '21 and two texts in March 2022, and he pled that he received these after submitting his phone number, and the only plausible conclusion we can draw here is that Rocket Mortgage received the phone number and then placed the calls and not that Rocket Mortgage randomly or sequentially created that phone number.

So, that's the essential problem with Counts One and Two. I'm happy to speak to the authorities that have rejected plaintiff's position in his opposition that you don't need to randomly or sequentially generate the number. I think that has been uniformly rejected by the Eighth Circuit, by the Ninth Circuit three times now, and I think we've provided a pretty good laundry list of District Court opinions rejecting that position.

And I understand your Honor is concerned with considering the original pleading, but, even considering just the amended complaint, there's nothing suggesting that Rocket Mortgage randomly or sequentially generated his phone number. It's just a conclusory allegation, which isn't sufficient under 12(b)(6).

THE COURT: What's the citation on Murphy again? What's that again?

MS. HENNECKEN: Yes, your Honor. One second. It's Phillips versus Murphy.

THE COURT: Yeah.

MS. HENNECKEN: It's 2003 Westlaw 22595198.

THE COURT: Okay. 2003.

MS. HENNECKEN: Westlaw 22595198. And then -- do you want the other cases?

THE COURT: No. Thank you, though.

MS. HENNECKEN: And I think the idea there is it's fine to look at the facts pled in the original complaint, especially when the facts in the amended complaint are sparse, and that's supported both by Murphy and the Lifchits case.

And then the other case I had cited, the Jeranian case, goes to the point that it's fair for the Court not to turn a blind eye to other admissions or statements of fact the parties have made in filings on the record.

So, I'd like to move on to Count Three, which is a regulatory claim. So, in Count Three the plaintiff alleges Rocket Mortgage violated --

THE COURT: Wait a minute. I think I want to pull up the complaint. See, the amended complaint talks about ATDS, paragraphs 8, 9 and 10, as far as I can tell.

MS. HENNECKEN: Let me pull that up.

THE COURT: They seem to allege it.

MS. HENNECKEN: Okay. I see where you are, your

Honor. Your Honor, what plaintiff has done in paragraph 8 is parroted the language from I think the Facebook opinion, saying -- well, actually, this isn't even a quote from the Facebook opinion -- but he's saying that the hardware and software used by defendant has a capacity to store, produce --

THE COURT: Slow down. You've got to slow down when you're reading.

MS. HENNECKEN: -- and dial random or sequential numbers *en masse* in an automated fashion, but I would say that is actually parroting case law from before the Facebook case. This was a consistent language that was used. And in Facebook the Court said, No. You have to allege facts showing that the number was randomly or sequentially generated.

THE COURT: What if the facts are the same as the case you're parroting from? I mean, what's wrong? You're still alleging facts, and that allegation was found to be specific. You lost me. I understand you have to plead facts.

MS. HENNECKEN: Yes, your Honor, and I think what he's alleging here is just a conclusion. There's nothing about -- he alleged he received a handful of phone calls, and there's nothing about the facts specific to the plaintiff that suggest anything about the hardware used by defendant. This is completely speculative.

THE COURT: Well, you can speculate on facts in the complaint. That's totally permissible. You might get blown

out at summary judgment. I get it. But read those paragraphs to me again slowly, please.

MS. HENNECKEN: In paragraph 8 he says, In making the autodialed calls at issue in this complaint, defendant and/or its agents utilized an ATDS. Specifically, the hardware and software used by defendant and/or its agents has the capacity to store, produce, and dial random or sequential numbers *en masse*, in an automated fashion. And then he goes on to say, On information and belief, the dialing system used to place the calls at issue has the capacity to use a random or sequential number generator in the process of storing numbers from a pre-produced list for texting and calling at a later date.

I can go on.

THE COURT: I gotcha. Thank you.

MS. HENNECKEN: So, I think the problem with these paragraphs here is that they're implausible, and the standard is plausibility. He can say speculative things, but if he hasn't shown facts that plausibly show an ATDS was used his claim fails, and here he's only alleged that he went online, submitted his phone number and then received four phone calls about a mortgage. So, there's nothing plausible there to support the statement that the number was randomly generated, your Honor.

And we cited authority saying that targeted phone calls are inconsistent with the use of an ATDS. So, even

setting aside the original pleading, in the amended complaint plaintiff says he received, I believe, a phone call and an email and another phone call from the same Rocket Mortgage team member. So, this person -- it's implausible to say that this banker was randomly or sequentially generating his phone number if it's the same person he's been speaking with.

THE COURT: All right.

MS. HENNECKEN: Moving on to Count Three, so in this claim plaintiff alleges that Rocket Mortgage violated a regulatory provision by the FCC, 47 C.F.R. Section 64.1200(c), by initiating telephone solicitations to plaintiff while his phone number was registered on the National Do Not Call Registry. So, the problem with Count Three is an essential element here is to allege telephone solicitation, and it's, in fact, to allege at least two telephone solicitations.

And, again, it's Rocket Mortgage's position that plaintiff has pled and that the Court may consider that plaintiff has pled that he provided his phone number. And, your Honor, we just went through the whole video flow and the 15-page process, and the provision of his phone number -- it's our position that he invited these calls.

And the FCC has defined "telephone solicitation" to explicitly exclude calls made with invitation or permission, and the FCC has stated that persons who, I'm quoting, knowingly release their phone numbers have, in effect, given their

invitation or permission to be called at that number.

So, based on this, it's our position that plaintiff invited the calls. He's therefore failed to plead -- and on the face of the pleadings he's invited the calls; he's failed to plead telephone solicitations. In the opposition brief plaintiff's main response is that consent is an affirmative defense under the TCPA, so I'd like to address that for a moment.

THE COURT: Yeah.

MS. HENNECKEN: The only authority plaintiff cites there is about a different TCPA provision. And we said this in our briefing. I just want to emphasize it. He points to no authority saying he doesn't have to plead an element of his claim, and here telephone solicitations is an element of his claim, and he doesn't -- and the case law he points to is about the ATDS provision, where some courts have said consent is an affirmative defense to making autodialed calls.

I'd like to briefly move on to Count Four. So, this is another regulatory claim, and, although it was unclear from the pleadings, I think plaintiff agrees that this is a claim brought under provision (d) of the same regulation, another (d) and (c) regulation, and I would like to speak to a threshold issue based on the notice of supplemental authority we filed just yesterday.

THE COURT: Yeah.

MS. HENNECKEN: So, the SEC published just a few days ago, a week ago today, a notice of proposed rulemaking about these (d) and (c) regulations, and in that notice the FCC said, We have never stated that they apply to text messages, and the proposed rulemaking is to amend it to make it apply to text messages. So, based on this notice, the two text messages in March and the text messages in September aren't covered or governed by this regulation. And Count Four is premised solely on two text messages. The allegation is Rocket Mortgage didn't implement the proper procedures to maintain an internal do-not-call list, and that claim is premised on these two texts in March, but if texts aren't governed by the regulation, then there's no basis for this claim to proceed.

THE COURT: Understood.

MS. HENNECKEN: There are other reasons this claim fails, even setting aside the notice. We think that's sufficient for dismissal. But I'd also like to point out that this is a procedures claim. The plaintiff has to plead a failure to implement procedures, and a one-off allegation of a failure to honor a stop request is insufficient to show that Rocket Mortgage, as a whole, has failed to implement procedures to maintain an internal do-not-call list.

And I'd also like to note that plaintiff points to no authority in his opposition brief showing that his facts here are sufficient, and he pleads no facts about Rocket Mortgage's

procedures. It is fair to say maybe he doesn't know what Rocket Mortgage's procedures are, but the regulation provides him with a right to request those procedures. Rocket Mortgage has to, on demand, provide its internal do-not-call policy, if asked. Plaintiff doesn't plead that he did so. He doesn't plead that he didn't receive it. So, there's no basis for him to say Rocket Mortgage lacks this procedure.

Another point on this is that this was actually evaluated in a prior decision in the Middle District of Florida, and the Middle District of Florida held that Rocket Mortgage has the requisite procedure in place, and plaintiff's response to this is, Well, that was several years ago; it's not relevant. But it is relevant. It's relevant to the plausibility of his claim that somehow Rocket Mortgage had the procedure in place, was maintaining an internal do-not-call list. Why would it no longer have it in place, especially after litigating the issue?

THE COURT: All right.

MS. HENNECKEN: Moving on to the last two counts, Counts Five and Six, these are the New Hampshire State law claims. So, plaintiff alleges that Rocket Mortgage violated the New Hampshire telemarketing sales call statute, and both these counts should also be dismissed for failure to state a claim based on the plain language of the statute. To our knowledge, there's no case law, published case law discussing

the statute, so we're going off the plain language, and the prohibition at issue states that it applies only to telemarketers making telemarketing sales calls to customers who registered their phone numbers on the National Do Not Call Registry. And, helpfully, the Legislature did define "telemarketers" and "telemarketing sales calls" and "telemarketing" and explicitly said telemarketing shall not include the solicitation of sales through media other than by telephone calls.

So, Count Six is alleging a violation of the statute based solely on the two text messages in March, and the statute says it only applies to phone calls. So, Count Six at the outset should fail, because the texts aren't governed by the statute.

Plaintiff's response to that was, because the TCPA in certain circumstances applies to texts, you should interpret the statute to also apply to texts, but it's just not in the plain language. There's nothing, no authority or guidance telling us that, especially with this explicit exclusion of other media.

And, lastly, with Count Five, the definition of "telemarketing" also states that it means any plan, program or campaign and so on which involves more than five telephone calls per month by a telemarketer in which the customer is located within the state, and, based on the plain language of

that statute, that means Rocket Mortgage -- the plaintiff has to allege Rocket Mortgage called him more than five times, and he's only alleged he received four phone calls. So, based on the plain language of the statute, it doesn't apply here.

Plaintiff's point in his opposition is this can't be right; it can't that be Rocket Mortgage can make one call to a bunch of people and not be a telemarketer. But there's no ambiguity here. There's no basis for us to deviate from the plain language. And the Legislature could very easily have said five phone calls to customers in New Hampshire, and it didn't. It's a singular word, and there's no basis for deviating here.

And last point on this: The definition of "telemarketing sales calls" says it does not include a call made in response to an expressed written or verbal request of the customer. So, this goes back to our point that the original complaint shows that he made this request. This is another reason why the statute doesn't govern here.

So, in conclusion, the Court should grant our motion, and I believe it should be with prejudice, because plaintiff has already amended, and I don't believe there are any facts he can add to cure the defects here.

THE COURT: Okay. Mr. Smith.

MR. SMITH: Thank you, your Honor. I want to start by addressing the initial complaint, and then I'll go into the

argument regarding the Motion to Dismiss. You know, I think the First Circuit was clear in the InterGen case that when an amended complaint supersedes the original complaint and the facts are no longer repeated or otherwise incorporated into the amended complaint they no longer bind the pleader. Now, the First Circuit did acknowledge that there may be exceptions to that rule, such as when you amend a complaint way later in a case and the other party would be harmed by the amendment of the complaint based on a shift completely in theory.

Rocket Mortgage doesn't suffer any harm here because of the amended complaint, because it was Rocket Mortgage that notified us that plaintiff didn't go to this website. One thing I want to point out is that consumers are at a disadvantage in understanding where telemarketers got their information, however, trying to be forthright, Mr. Daschbach recalled visiting this website, and so he assumed that's where Rocket Mortgage got his information; but counsel has informed us he didn't go to this website, he went to another website, which my client does not have any recollection of visiting, so we removed those allegations and pleaded the amended complaint as is. So, I do not believe the facts from the original complaint can be considered with respect to the Motion to Dismiss.

And the only other point I want to make on that is, regardless of the complaint, in both iterations plaintiff

maintains that he did not consent or provide any prior invitation or permission to receive the calls.

Jumping into the defendant's arguments with respect to the Motion to Dismiss, I'll just take them in turn, they ask to dismiss Counts One and Two because they claim plaintiff failed to allege sufficient facts regarding the use of an automatic telephone dialing system or an ATDS. Their argument should be rejected for really two reasons. First, they read Facebook too narrowly, and they propose an insurmountable pleading standard; and, second, they ignore the allegations that are in the complaint.

With respect to the first issue, no party is going to dispute that Facebook is a controlling case and that the Supreme Court's decision represented a shift in how auto dialers are defined. We do dispute the scope of that ruling. If we just take the definition that the Supreme Court laid out, they held that an automatic telephone dialing system must have the capacity, which is an important word, capacity to either store a number using a random or sequential number generator or to produce a number using a random or sequential number generator. The reason "capacity" is important is because it doesn't mean the dialing system has to use that function with respect to every call; it just has to have the capacity to do so.

Furthermore, "random or sequential number generator"

does not refer to -- or does not mean random or sequential telephone number generator. It refers to the creation of each digit within a number. If it's read as random or sequential telephone number generator it reads "store" completely out of the statute, because then the number generator would always be producing a number to be called. So, it's actually referring to the individual digits, which is why systems that can call from a pre-produced list can still be considered an ATDS.

And the Supreme Court spoke directly to this, rejecting the defendant's argument. In Footnote 7 it said, and let me quote here, An auto dialer might use a random number generator to determine the order in which to pick phone numbers from a pre-produced list. That is exactly what plaintiff alleges happened in this case.

And then the other issue with Facebook is it didn't really speak to the pleading standards. It just issued a decision saying you need to -- any dialer that qualifies as an ATDS must meet this definition. And so, courts pre Facebook and post Facebook understand that consumers are at a severe disadvantage regarding alleging the technical capabilities of a defendant's dialing system. In most cases they are treated as confidential, and they have no access to that information, so courts generally asked plaintiffs to allege indirect facts, whether that be the generic content of the message, frequency of the calls, the use of short codes.

And this is getting to my second point, is that the defendant ignores all the allegations in the complaint. So, I think you referred to paragraphs 8, 9 and 10, and those do relate to automatic telephone dialing system claims. However, we also allege that he received five calls and texts within three days, we allege that all of the texts were received from the short code, and we allege the actual content of the text messages which show that they are general in nature, not specific to plaintiff, and that they had automated response options. It is these facts that we used to extrapolate to the paragraphs 8, 9 and 10 to suggest that an automatic telephone dialing system was likely used in this case.

The issue at the pleadings is plaintiff must rise above a certain level to suggest it to be true, right? And he has alleged facts that would suggest an auto dialer was used. The decision of whether or not the system actually qualifies as a dialing system is a decision that should be made based upon a complete record.

THE COURT: Okay.

MR. SMITH: With respect to the second argument for the dismissal of Count Three of the complaint, the first DNC Registry claim, the defendant argues that there are no telephone solicitations because the plaintiff provided his consent by releasing his telephone number. There's multiple issues with this argument, your Honor. The first, as I already

addressed, the initial complaint does not bind plaintiff and --

THE COURT: I think I made up my mind on that.

MR. SMITH: Okay.

THE COURT: I just think the Circuit authority is that at 12(b) I can't rely on it, bottom line. Now, that doesn't alleviate my concerns, though, about the way this sort of plays out. And now we have you making certain representations that aren't in the affidavit. Frankly, I remember a prior litigation with Mr. Daschbach where it was similar what I consider gamesmanship. So, I think you're right on the law, I do, but I'm concerned about the posture of it, to be honest. We'll have to follow the law and cross that bridge when we come to it.

MR. SMITH: Okay.

THE COURT: You don't need to address the other counts. You're good.

MR. SMITH: What's that?

THE COURT: You don't need to address the other counts.

MR. SMITH: Oh. Thank you, your Honor.

THE COURT: Okay, Counsel.

MS. HENNECKEN: I'd like to address a couple of things, if that's all right.

So, setting aside the original complaint, I do want to address plaintiff's points about other allegations he made

supposedly supporting sufficiency of his pleadings on the ATDS element and the Footnote 7 argument. I'd like to speak specifically to that language in Facebook's decision. I think the Ninth Circuit stated it best when addressing this exact argument that you somehow don't have to randomly or sequentially generate the phone number, when it said, This is an acontextual reading of a snippet divorced from the context of the footnote and the entire opinion. I think the law is very settled that the phone number has to be randomly or sequentially generated.

But as to the other facts alleged, plaintiff points to the fact that he received text with a short code and that there were four phone calls and a text within a short period of time, but those elements are actually no longer relevant to pleading whether a random or sequential number generator was used. In fact, one of the cases plaintiffs cited, Mina versus Red Robin, I believe. It was a case in the Central District of California that had said using a short code was indicative of an ATDS pre Facebook. That case was transferred to the District of Colorado, an amended complaint was filed, and post Facebook it was dismissed, so those facts were no longer sufficient.

The issue that the Court was concerned about and Congress was concerned about in passing the statute was emergency telephone lines and tying up sequential phone numbers. It wasn't interested, and the Eight Circuit said this

and the Ninth Circuit, in preventing companies from calling consumers who provided their phone numbers or calling people from a list. That was not the concern here. And there's no other facts that plaintiff has pled showing that somehow his number was randomly or sequentially generated. So, for that reason I think plaintiff has failed to state a claim.

THE COURT: Understood. All right. I think I'm good. This is a close one. This is a close one, but I'll get an order out here relatively shortly. I think -- it wasn't the main focus of anybody's argument, and I didn't really expect it to be, but this question of how I'm supposed to use -- look, the screen shots are much clearer than the video. It's that simple, you know? My take on it is that I think in a situation on a motion like this I'm supposed to draw inferences in favor of the nonmoving party both at summary judgment and on a motion to dismiss. The arbitration is basically on a summary judgment standard.

That said, you've clarified for me a couple of misconceptions I had about the video, and you've explained this idea that you think the graphics have been degraded a little bit, and it's not something I can sort of quantify and rely on, but it's something I can at least be cognizant of in my evaluation of the whole thing.

All right, everybody. I appreciate it. Let's go off the record for a second.

(Discussion held off the record)

(WHEREUPON, the proceedings adjourned at 11:25 a.m.)

C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my knowledge, skill, ability and belief, a true and accurate transcription of the within proceedings.

Date: 7/10/23

/s/ *Brenda K. Hancock*
Brenda K. Hancock, RMR, CRR
Official Court Reporter